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The Europeanisation of international family law : From Dutch to European law

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Summary

In the European Union questions of international family law arise to an increasing extent. The free movement of persons, one of the fundamental freedoms of the European Union, has resulted in the increased mobility of citizens in the last few decades. The growing mobility of Union citizens in turn has led to a consequential rise of formation and dissolution of international families.

This rise of international family law disputes in the European Union explains the European legislature's interest in the field of private international law. If the court of a Member State is faced with an international family law case, the application of its own legal system is not always obvious. The circumstances of the case may lead to the application of foreign law. Almost every state has choice of law rules that determine on the basis of one or more connecting factors which legal system is to govern a particular question, by allocating it to one system or another. Currently the national choice of law rules of the EU Member States are more and more displaced by common European rules. In the field of private international law the EU is gaining more and more ground: private international law is, so to say, being 'Europeanised'. This research concentrates on the Europeanisation of international family law.

International family law is an area that is currently predominantly regulated by national law; Europeanisation will therefore in all probability entail considerable changes. This research deals with the question on the methodological consequences of the change from a national to a supranational choice of law approach? The nature and reasons of these changes in one particular field of international family law are discussed: the termination by dissolution of marriages and marriage-like registered partnerships. Divorce is the first field of family law in which the European legislature made attempts to unify the choice of law: in July 2006 the European Commission proposed the introduction of common choice of law rules on divorce. In order to assess the central question, the current Dutch and the proposed European choice of law rules on divorce are examined and compared. Subsequently, a number of directions as regards the methodology of European international family law at large are deduced from the European attempt to unify the choice of law on divorce. This study consequently results in a look into the future with respect to the methodological aspects of the European system of international family law that is being established as a whole.

The first part of this study addresses the Dutch dimension of the research: in chapters 2 and 3 the Dutch choice of law rules on divorce and on the termination of registered partnerships are examined.

Chapter 2 delves into the Dutch choice of law rules on divorce. The law applicable to divorce is currently determined by Article 1 of the Choice of Law Act on Divorce (*Wet conflictenrecht echtscheiding*). This Act is based on the *favor divortii* principle, implying that the choice of law rule often refers to the application of a legal system which does not preclude the wish of the parties to obtain a divorce.

The main rule of Article 1 CLAD is that the spouses can choose the law applicable to their divorce. This choice, however, is limited to the law of the common nationality of the spouses (Article 1(2) CLAD) and Dutch law (the *lex fori*, Article 1(4) CLAD). Although the possibility to choose the applicable law is to be endorsed,

the limitation to the mentioned two legal systems can be questioned. In the light of the *favor divortii* principle arguably more legal systems should be eligible for application.

Should the parties have made no *professio iuris*, the law applicable to their divorce is determined on the basis of the cascade rule of Article 1(1) to (3) CLAD. The regulation of Article 1(1) to (3) CLAD entails the designation of the common national law of the spouses as the applicable law if they have a common nationality. In determining whether the spouses possess a common nationality, their nationality is subject to an authenticity test and to an effectivity test. If the spouses do not have a common nationality, the law of the country in which they have their common habitual residence is applied. If the spouses do not have a common nationality and have no shared habitual residence, Dutch law (the *lex fori*) is applied.

Chapter 2 does not only discuss the current state of play, but also the proposed amendment of the choice of law on divorce. In September 2009 the Dutch legislature published the proposal on the consolidation of Dutch private international law, to be included as Book 10 of the Dutch Civil Code. Article 56 of this Proposal provides for the application of Dutch law in all cases, save for those in which the parties have made a *professio iuris*. The *professio iuris* is limited to the common national law of the parties. The proposed amendment seems to imply a fairly radical change of the current choice of law approach on divorce: from a multilateral and neutral to a unilateral choice of law approach. However, Article 1 CLAD is not such a neutral choice of law rule as it appears to be: it often leads to the designation of Dutch law as the applicable law. Article 56 of the Dutch Proposal on Private International Law no longer gives the impression of a neutral choice of law rule and the application of Dutch law takes indeed first place. Nevertheless the argument that, because in practice Dutch law is applied in the majority of international divorce cases, the choice of law rule should be turned into a unilateral choice of law rule is not very convincing for the radical change of choice of law approach. The categorical application of the *lex fori* contradicts the thought of neutrality which underlies the field of private international law and by virtue of which all legal systems are equally eligible for application.

Chapter 3 deals with the Dutch choice of law rules on the termination of registered partnerships. Despite some activity in this field, to date there is no international treaty providing for a regulation of the private international law aspects of registered partnerships. It is not very probable that an international treaty will be drawn up in the near future. The number of states that recognise the possibility of cohabitation outside marriage or of a registered partnership is too small. Although the number of countries introducing the institution of registered partnership increases, the large diversity of national regulations in this field will make it very hard to reach consensus on the international level.

The Dutch Choice of Law Act on Registered Partnerships (*Wet conflictenrecht geregistreerd partnerschap*) provides for the choice of law on registered partnerships. Since Dutch law places registered partnerships as much as possible on an equal footing with marriage, the choice of law rules regarding the termination of registered partnerships sought connection to the choice of law rules on divorce. The choice of law on the termination of registered partnerships is based on the principle of *favor dissolutionis*, which implies that they aim to favour the possibility to terminate a registered partnership in an international case.

The choice of law on the termination of registered partnerships has been divided in two categories: the registered partnerships entered into in the Netherlands (Article 22) and those entered into outside the Netherlands (Article 23). Article 23 CLARP

makes a further distinction between termination by mutual consent and dissolution by the court. This structure can be traced back to Dutch procedural law. The Dutch legislator has created a two-track system for the termination of registered partnerships: the administrative procedure on the one hand and the judicial procedure on the other.

The principal rule regarding the applicable law to the termination of a registered partnership is that Dutch law will apply in all cases unless the partners have chosen the application of the *lex loci celebrationis*.

The general transitional provision of the Choice of Law Act on Registered Partnerships works out rather unfortunate with respect to the termination of registered partnerships. According to Article 29 of the CLARP do the rules provided for by the CLARP not apply to registered partnerships concluded prior to the date of its entry into force. This means that the termination of registered partnerships is only governed by the CLARP if the partnership has been entered into on or after 1 January 2005. Unfortunately the Dutch legislature has not amended this transitional provision in the Dutch Proposal on Private International Law.

In chapter 4 the European Union's competence to enact measures in the field of international family law is discussed. International family law is brought more and more under the influence of the European Union. The biggest catalyst was the entry into force of the Treaty of Amsterdam in 1999, which granted the EU the competence to enact measures in the field of private international law (ex Article 61(c) in conjunction with Article 65 EC-Treaty) in order to progressively establish an area of freedom, security and justice. The recent Treaty on the Functioning of the European Union has taken the integration a step further by formally expanding the legal basis of the EU's competence to establish private international law measures.

Common rules for matters of international family law would serve a number of objectives. In the first place, such unified rules will serve a number of general goals: they will ensure more legal certainty, prevent forum shopping, provide for more decisional harmony, grant better protection to the legitimate expectations of the parties, prevent the development of limping relationships and contribute to the achievement of justice. These objectives would, however, be fulfilled by any unification and not specifically at the European level. There are, therefore, also proper 'European' policy objectives that play a role, such as the promotion of integration, enhance judicial cooperation, give substance to the concept of European citizenship and ensure the sound functioning of the internal market.

The question arises whether the EU is competent to enact a European regulation unifying the choice of law on divorce. The assessment of this question shows that the requirements of both ex-Article 65 EC-Treaty and Article 81 TFEU are fulfilled.

In July 2006 the Commission has proposed the introduction of common choice of law rules on divorce in the Brussels IIbis-Regulation, which contains common rules on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (the Brussels IIter-Proposal). The introduction of common choice of law rules on divorce is regarded as a means to removing alleged shortcomings resulting from the lack of such rules. Chapter 5 contains an analysis of these proposed choice of law rules. This analysis has shown that there are still some difficulties to be clarified. Moreover, quite a number of issues are left to national law, which is not very conducive to clarity and legal certainty.

The Brussels *Iter*-Proposal aspired to attain five objectives: providing for a clear and comprehensive legal framework, strengthening legal certainty and predictability, increasing flexibility, ensuring access to court and preventing a rush to court. Overall the conclusion is that the Brussels *Iter*-Proposal succeeds quite well in attaining these objectives. However, some of the objectives set by the Proposal seem too ambitious to be attained by this single instrument: as no choice of law rules on the consequences of divorce are established, legal certainty and predictability are not entirely strengthened and a rush to court for the latter issues will continue.

However, the Member States failed to reach consensus on the Brussels *Iter*-Proposal. Chapter 6 distinguishes three distinct problems that underlie the failure of the establishment of common choice of law rules on divorce have been distinguished. In the first place, the position of Malta - the only Member State that does not provide for divorce in its substantive legislation - posed problems. Moreover, doubts existed concerning the EU competence in the field at hand: mainly the fulfilment of the internal market requirement on the one hand and the fulfilment of the principles of subsidiarity and proportionality on the other posed problems. However, during the negotiations in the Council both these problems seem to have been solved. The last problem observed is the methodological approach of the common choice of law rules. The large differences in substantive law on divorce of the Member States seem to require the adoption of neutral choice of law rules. However, not all Member States agree with such an approach, as they wish to continue to apply the *lex fori*.

The fundamental discord between the Member States concerning the Brussels *Iter*-Proposal has led to the search for alternatives. Several alternatives have been discussed, neither of which would lead to a proper or feasible solution. Therefore, an alternative to the establishment of a common choice of law does not currently seem to be present. Apparently, the European Union as a whole is not yet ready for a common choice of law on divorce. Consequently, the procedure on enhanced cooperation is the 'last resort' for establishing some form of cooperation between the Member States in the field of the choice of law on divorce. However, establishing enhanced cooperation in the field of divorce does create a possibly impeding precedent for all future EU projects on international family law, such as matrimonial property and succession.

Chapter 7 contains a comparison of the choice of law systems on divorce of the Netherlands and of the European Union. Even though the adoption of the Brussels *Iter*-Proposal has been cancelled, the comparison between the Dutch and the European system of the choice of law on divorce remains of importance to answer the question whether from the attempt to unify the choice of law on divorce on the European level some more general directions can be deduced as regards the European methodology of international family law at large.

Although on the face the current Dutch and the proposed European choice of law on divorce may seem to differ, both systems have many characteristics in common. The underlying structure of both these systems is similar: party autonomy is regarded as the prevailing principle. Only in the absence of a *professio iuris* on divorce, the applicable law to divorce is determined by the choice of law rules, which are based on the principle of the closest connection in both systems. The main differences are to be found in the further details of the regulations.

However, there are considerable differences between the Brussels *Iter*-Proposal and the proposed amendment of the Dutch choice of law on divorce. Firstly, the intended amendment of the Dutch choice of law will no longer regard the principle of

party autonomy as the prevailing rule. Moreover, while the Brussels IIter-Proposal is based on the principle of the closest connection, Article 56 of the Dutch Proposal on Private International Law is based on the *lex fori*-approach.

Chapter 6 showed that the Netherlands opposed the Brussels IIter-Proposal for fear of a less favourable choice of law on divorce than Dutch law currently provides for. The analysis in this chapter made clear that whether or not this fear is justified depends on the system which has been taken as a point of departure: the current Dutch choice of law rule of Article 1 CLAD or its proposed amendment. The observed fear is not really justified in comparison with the current Dutch choice of law on divorce. However, compared to Article 56 of the Dutch Proposal on Private International Law which adheres to the *lex fori*-approach, the fear of the Netherlands seems to be more justified. Although the application of the Brussels IIter-Proposal may in the vast majority of cases lead to the application of forum law, it may very well lead to the application of foreign law considering both the *professio iuris* of Article 20a and the cascade rule of Article 20b of the Brussels IIter-Proposal.

In chapter 8 the future of the Europeanisation of international family law is discussed. The European Commission currently develops a common European system of international family law. According to the Hague Programme, instruments in the field of family law including divorce, maintenance, and matrimonial property should be completed by the year 2011. Moreover, also issues such as personal status, names and adoption have been mentioned as future areas of Union action in the field of private international law. From the failure to reach a compromise on the Brussels IIter-Proposal a number of lessons are drawn for future projects: the Member States should address the choice of law methodology and more transparency and coherence is required.

A proper EU system of international family law will constitute a full part of European law, which has repercussions on its content. This does not only mean that the European doctrines of direct effect and primacy apply to EU private international law rules, but also that more specific political goals, such as the promotion of integration and the establishment of the area of freedom, security and justice, are pursued. Moreover, the EU legislature has to respect the legal diversity of the Member States.

Due to the high number of objectives attached to the unified choice of law, the underlying choice of law methodology is characterised by a pluralism of methods, within which the principle of the closest connection is the point of departure. This latter principle joins the objectives of legal certainty, predictability and mutual trust. Furthermore, the principle of the closest connection ensures that the legal systems involved are evenly and equally eligible for application.

More coherence is not only attained by the development of an EU choice of law methodology, but also by a uniform approach as regards the general doctrines of private international law, such as the public policy exception and characterisation.